Petitioner,

Jr.,

Respondent.

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-913

JOHN R. PATTERSON,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL URGING AFFIRMATION

Pursuant to Rule 37.4 of the Rules of the Court, The American College of Trust and Estate Counsel (the "College") moves to appear as *Amicus Curiae* and for leave to file the attached *amicus curiae* brief urging that the opinion of the Court of Appeals for the Fourth Circuit be AFFIRMED. Pursuant to Rule 37.3, the Respondent has given the College a written consent to file this *amicus curiae* brief, but the Petitioner has not, thereby requiring that this motion be filed.

The American College of Trust and Estate Counsel is a professional association of lawyers with a current membership of over 2,600 Fellows from throughout the United

States who have been elected to membership by their peers on the basis of their professional reputation, their demonstrated exceptional skill and ability in probate, trust, estate planning and employee benefits law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. It is the policy of the College, as set forth in its Handbook, to file *amicus curiae* briefs only with the authorization of the Board of Regents and then only "sparingly" and on matters "of special significance to the legal profession or the public." In its forty-five year history, the College has filed only four prior *amicus curiae* briefs, choosing to undertake that task on issues of national importance "where such a brief would contribute significantly in the determination of the issues involved."

With the growing economic displacement now occurring, not only among rank and file employees but in the executive and professional ranks as well, and with the increasing number of bankruptcy filings, it cannot be doubted that the issue before the Court in this case touches the lives of many Americans. There have been in excess of 100 contested cases in each of the last three years involving the questions raised by this appeal. The resolution of the issues is snarled in complex statutory provisions requiring that two federal statutes, state law, and the public policy reflected in those statutes be reconciled. The courts are, to understate the case, in disarray in effecting such reconciliation.

Because this issue was first litigated in the bankruptcy courts by bankruptcy lawyers, the early cases announced the law without the benefit of the experience and viewpoint of the trust bar and the employee benefit bar. Some of those decisions clearly indicate a failure by the courts to understand the intricacies and operation of ERISA and the basic principles of trust law which operate on the employee benefit trusts created pursuant to that statute as well as under state law. If the Bankruptcy Code and

ERISA are to be harmonized, then a comprehensive understanding of the key provisions of both statutes is required.

The College's brief supports the contentions of Respondent that the interest of a debtor in a qualified plan is <u>excluded</u> from the bankruptcy estate since ERISA constitutes "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), and that alternatively ERISA's anti-alienation provision is an exemption provided by federal law under 11 U.S.C. § 522(b)(2)(A). As to Petitioner's third point in his Petition for *Writ of Certiorari*, it is the College's position that the public policy of protecting retirement benefits propounded by Congress through ERISA is clear and draws no distinctions between persons "in control" and those not so situated.

The College's position differs to an extent from that of Respondent. In answer to the public policy issue raised by Petitioner, Respondent would seek to distinguish the Coleman Furniture Company Pension Plan (the "CFC Plan") from those of smaller businesses on the basis that the CFC Plan had approximately 400 participants and that CFC was a large corporation. That factor should not affect the analysis or the application of the law. Mr. Shumate was as much in control of CFC and the CFC Plan as he would have been had CFC had only two employees. The College would urge that Congress did not draw any such distinctions based upon size, and that the public policy protects the owner of a small closely-held business as well as the owner of a large closely-held business.

Further, Petitioner relies heavily on an analysis of 11 U.S.C. § 522(d)(10)(E), and particularly subsection (iii) thereof, to demonstrate that the reading of 11 U.S.C. § 541(c)(2) urged by Respondent and the College would somehow render 11 U.S.C. § 522(d)(10)(E) meaningless, and thereby violate the basic rule of statutory construction that Congress did not enact superfluous provisions. Because ERISA is the crux of the subsection (iii) argument, the College can provide to this Court an analysis grounded in familiarity and expertise.

If the Court should decide that the debtor's interest in a pension plan is neither excluded nor exempt (or that public policy requires a differentiation based upon the interest of the debtor in the plan sponsor), such decision will destroy ERISA's carefully crafted federal scheme, and will throw the issue back to the states so that plan administrators will be forced to deal with the laws of fifty-one separate jurisdictions. The College will illustrate in its brief the results of that approach to this issue, and why that conflicts with the sound public policies already enunciated by ERISA as acted upon by the Bankruptcy Code.

The College believes that while some of these issues will be addressed by Respondent (and have already been addressed by Petitioner and Petitioner's *amicus curiae*), the College brings a different viewpoint as well as a different depth of expertise to these issues. The College has no client to represent, and is interested solely in the public interest and in assisting this Court to resolve these issues so that the burden on the federal court system can be eased.

WHEREFORE, having shown that the College brings a different perspective to the proceedings, and that the expertise of the College in ERISA and trust law will allow it to bring to the attention of the Court relevant matters not raised by the parties, the College prays that its motion for leave to file its *amicus curiae* brief be GRANTED.

Respectfully submitted,

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Dated: April 3, 1992.

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BRIEF OF AMICUS CURIAE THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL URGING AFFIRMATION

INTEREST OF THE AMICUS CURIAE

The American College of Trust and Estate Counsel (the "College") respectfully submits this brief in support of the position of Respondent, and has obtained the permission of Respondent to do so. The College has been unable to obtain the permission of the Petitioner and therefore has simultaneously herewith filed its Motion for Leave to File Amicus Curiae Brief pursuant to Rule 37.4.

The College is a professional association of lawyers with a current membership of over 2,600 Fellows from throughout the United States who have been elected to membership by their peers on the basis of their professional reputation and their demonstrated exceptional skill and

ability in probate, trust, estate planning and employee benefits law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. The College has no "client" in this matter. Rather, as a professional organization dedicated to the service and advancement of the law, the College feels a duty to employ its expertise in such a way as to provide whatever assistance it may to the Court in resolving the complex issues which have vexed the lower courts at all levels, and have produced an extreme amount of litigation.

The College does not undertake the filing of *amicus curiae* briefs lightly. It has a stringent policy requiring that such briefs be filed on behalf of the College only on issues of special significance to the legal profession and to the public, and then only with the consent of the Board of Regents of the College. Even then, such brief may only be filed in support of a position of the College. Because of its recognized preeminence in the estate planning, probate, trust and employee benefits bars, the College does not adopt a position that it feels is not in the public interest.

The College's brief, while supporting the result urged by Respondent, nevertheless seeks to take a broader view of the problems and to deal with arguments not sufficiently raised or dealt with by the parties. Additionally, the College will bring to the attention of the Court certain consequences, not readily apparent, which would naturally flow from a decision for Petitioner.

SUMMARY OF ARGUMENTS

This case is before this Court with the request that it answer three issues: whether a debtor's interest in a pension plan is "property" included in the estate of a bankrupt participant; if included, whether it is nonetheless exempt; and if either excluded or exempt, whether there is some overriding public policy which would cause those rules not to apply to a person in a position to exercise dominion and control. Despite the best efforts of the Petitioner to

make it otherwise, the case, purely and simply, is one of statutory construction.

There is no dispute that pension plans are protected from claims of creditors prior to the filing of a petition in bankruptcy. Congress, in enacting ERISA, made clear both its purpose and the means Congress chose to accomplish that purpose—to create a uniform federal scheme which would protect the interest of employees in their pension benefits through ERISA's anti-alienation provision. It is ludicrous to suppose that Congress meant to remove that protection in bankruptcy, just when it was needed most, thereby frustrating the principal purpose of ERISA announced by Congress.

Question 1: *Is the participant's interest excluded from the estate?*

The Bankruptcy Code[1] requires first that all property of the bankrupt as defined by Code § 541 be included in the bankruptcy estate, except certain trusts not treated as property under Code § 541(c)(2). Although Code § 522 provides that the debtor may choose to exempt assets from the bankruptcy estate under an exclusively federal exemption scheme or under the state law exemptions (which include federal law other than the Code), there is no federal/state dichotomy with respect to the definition of property and what interests are not property; *i.e.*, what interests are "excluded" from the estate. The exclusion under Code § 541(c)(2) applies to any applicable nonbankruptcy law, including ERISA, and is nowhere limited to, although clearly including, state spendthrift trust law. In fact, to so limit the exclusion is to render it a nullity in an opt-out state such as Virginia or with respect to any bankrupt that elects the state law exemptions in a non opt-out state. Applicable nonbankruptcy law is an unambiguous term referring to both state and federal law. Even if the term is not unambiguous, established rules of sta-

[1] All references to the provisions of the Bankruptcy Code as codified at 11 U.S.C. §§ 101, *et seq.* (1979 & Supp. 1991), will be hereinafter referenced to the section number preceded by "Code."

tutory construction still cause such phrase to encompass both state and federal law.

Construing the exclusion to apply to pension plans does not render the exemption granted under Code § 522(d)(10)(E) meaningless. "Pension plan" is a defined term under ERISA § 3(2)(A)[2], and it is *solely* to these plans that ERISA's anti-alienation provision in ERISA § 206(d)(1) applies. The reach of Code § 522(d)(10)(E) is much broader and includes plans which are not required by ERISA to have an anti-alienation provision and which would not be exempt absent that section. While there may be some overlap, the exclusion does not preempt the field of the exemption. Additionally, the literal language of Code § 522(d)(10)(E) refers to "payments" under the plans to which it applies, whereas the Code § 541 exclusion relates to the plan itself. The exemption is provided for those payments as they are received by the bankrupt.

Question 2: ***If not excluded, is the participant's interest exempt?***

The state law exemption scheme includes assets exempt under state law and under federal law other than the Bankruptcy Code. If the Court should find that the debtor's interest in the pension plan is not excluded, then ERISA's anti-alienation provision should be construed to provide an exemption under the "other federal law" exemption of Code § 522(b)(2)(A). Clearly, the anti-alienation provision of ERISA provides an exemption outside of bankruptcy, and there is no reason such exemption should not carry forward into bankruptcy. There is no conflict between the other federal law exemption in Code § 522(b)(2)(A) and the specific federal exemptions in Code § 522(d), since the two are mutually exclusive. The debtor must elect one or the other in those states which have not opted-out of the Code § 522(d) exemptions, and cannot

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[2] All references to the provisions of the Employee Retirement Income Security Act of 1974 as codified at 29 U.S.C. §§ 1001, *et seq.* (1985 & Supp. 1991), will be hereinafter referenced to the section number of the Act preceded by "ERISA."

elect the Code § 522(d) exemptions in those states which have opted-out. The Code creates two separate and distinct exemption schemes, and they are not, nor are they intended to be, equal in all respects.

Question 3: ***Is there public policy not contained in the statutory language that limits the statute's application?***

ERISA does not distinguish between those persons in control and those persons not in control of pension plans in imposing the anti-alienation requirement of ERISA § 206(d)(1). Nor does the Bankruptcy Code draw any such distinction. In fact, the public policy of ERISA (to protect the retirement benefits of plan participants from the reach of creditors) is made clear in its language and legislative history. The public policy of the Bankruptcy Code is to permit debtors to achieve a "fresh start," whether the debtors were blue collar or white collar, owners or employees. That fresh start is achieved by allowing the debtors to exclude or exempt from the bankruptcy estate those assets protected under state and federal law (other than the Code) or under Code § 522(d). There is no public policy to be served by forcing the bankruptcy courts to draw distinctions among debtors based upon their station in life, particularly since such distinctions are not contained anywhere in the statute nor are they relevant outside of bankruptcy with respect to pension benefit plans.

If the Court should choose to agree with Petitioner that pension plans are neither excluded nor exempt under the Code, then the Court has still left the field open for further litigation to continue unabated. The unresolved issues are:

- Whether the so-called state "shield statutes" are preempted by ERISA so as to be ineffective to create an exemption in bankruptcy.
- Whether a particular pension plan is a spendthrift trust as to the interest of a particular participant as determined solely under state law.

- When, and to what extent is a trustee entitled to a turnover of the actual assets represented by the participant's interest in the pension plan.
- Whether, as the Internal Revenue Service contends, a turnover order disqualifies the entire plan, thus creating adverse tax consequences for the employer and the other participants.

If the judgment of the court below is upheld, as it should be, these questions will be rendered moot, as they should be.

ARGUMENT

I. THE TERM "APPLICABLE NONBANKRUPTCY LAW" FOR PURPOSES OF CODE § 541(c)(2) IS NOT LIMITED TO STATE SPENDTHRIFT TRUST LAW, BUT RATHER INCLUDES RESTRICTIONS ON TRANSFER IMPOSED BY ERISA'S ANTI-ALIENATION PROVISION.

A. When construing two interrelating statutes, they should be construed to give effect to both.

1. The overriding purpose of ERISA is to create a viable private pension system and to effectuate this by protecting the interests of participants in pension benefit plans.

ERISA was enacted to create a comprehensive federal scheme which would encourage the creation of a private pension system to supplement social security and to provide the working men and women of America dignity in their retirement.[3] In order to carry out this purpose, Congress recognized that the participant's interest in a pension plan must be protected from the claims of creditors, and Congress accomplished this protection by enacting a requirement that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." ERISA § 206(d)(1) (the "anti-alienation provision"). Only pension benefit plans are protected under ERISA's anti-alienation provision, even though ERISA's scope is much broader, extending to any employee benefit plan.[4] The anti-alienation provision is required to be included in every pension plan covered by Title I of ERISA,[5] or the plan sponsor and administrator are subject to both civil and criminal penalties.[6]

[3] H.R. Rep. No. 533, 93d Cong., 1st Sess. 6-8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4645-46.

2. The Bankruptcy Code should be construed to effectuate the purposes of ERISA by determining that the Code protects the debtor's interest in pension plans just as such interests are protected by ERISA outside of bankruptcy.

It is undisputed even by Petitioner that pension plans are protected prior to the time the debtor is adjudicated a bankrupt. Petitioner's Brief, p. 19, (*citing Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990)). Based upon the anti-alienation provisions of ERISA and the Internal Revenue Code,[7] courts have not been hesitant to insulate retirement benefits from garnishment or attachment by creditors outside of bankruptcy, even where the participant may withdraw the funds. *See, e.g., Travelers Ins. Cos. v. Fountain City Fed. Credit Union*, 889 F.2d 264, 266 (11th Cir. 1989) (plan could not be garnished even though it was terminated and the benefits were available in a lump sum); *Smith v. Mirman*, 749 F.2d 181, 183-84 (4th Cir. 1984) (same). Moreover, Courts have

[4] A pension benefit plan is one which relates primarily to retirement. ERISA § 3(2). While the term "employee benefit plans" includes pension plans, it also includes employee welfare plans such as health plans, disability plans, and vacation pay plans. ERISA § 3(3).

[5] Even some pension plans, such as government plans and certain church plans, are not subject to Title I of ERISA, including its anti-alienation provision.

[6] *See* ERISA §§ 501-02.

[7] All references to the provisions of the Internal Revenue Code as codified at 26 U.S.C. §§ 1, *et seq.* (1988 & Supp. 1992) will be hereinafter referenced to the section number preceded by "IRC."

indicated that the treatment of property should be the same whether inside or outside of bankruptcy. *See Butner v. United States*, 440 U.S. 48, 55 (1979) (to prevent forum shopping and creditor windfalls, property should be treated the same under bankruptcy law as under debtor-creditor law).

In *Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S. 825 (1988), this Court observed that Congress adopted ERISA § 206(d)(1) because otherwise "ERISA plan benefits could be attached and/or garnished." *Mackey*, 486 U.S. at 837. The Court reasoned that

> by adopting [ERISA] §206(d)(1), Congress demonstrated that it could, where it wished to, stay the operation of state law as it effects only benefits and not plans . . . when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans.

Id. at 836.

The holding in *Mackey* and the principle of anti-alienation was reinforced in *Guidry*. In rejecting the judicially implied participant fraud exception to ERISA's anti-alienation provision, the Court reaffirmed that there are no exceptions to ERISA's anti-alienation provision unless Congress specifically expresses one. *Guidry*, 493 U.S. at 370; *Herberger v. Shanbaum*, 897 F.2d 801, 804 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 60 (1990) ("Congress will create exceptions where it sees fit and courts should not do so.")

There is no reason that this federally mandated protection should not carry over into bankruptcy and there offer the shelter from creditors that Congress intended. Code § 541(c)(2) provides a vehicle for achieving this result, although the earlier cases failed to perceive this obvious nexus. *See Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984); *Goff v. Taylor (Matter of Goff)*, 706 F.2d 574 (5th Cir. 1983). *See also Matter of LeFeber*, 906 F.2d 330 (7th Cir. 1990); *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Banker's Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985); *In re Kirk*, 101 B.R. 476 (Bankr. N.D. Tex. 1989); *In re Colsden*, 105 B.R. 500 (Bankr. N.D. Iowa, W.D. 1988); *In re Hysick*, 90 B.R. 770 (Bankr. E.D. Pa. 1988);.

Goff is the seminal case among those holding that the "applicable nonbankruptcy law" reference in Code § 541(c)(2) does not include ERISA's anti-alienation provision within its scope. Primarily, *Goff* and its progeny relied on legislative history of the Bankruptcy Code to limit the application of applicable nonbankruptcy law to trusts which qualify as spendthrift trusts under state law.[8]

There is no way to distinguish factually those cases decided in the middle 1980s from the case at bar. Recently, however, the reasoning and approach of *Goff* has come under scrutiny, and in many cases has been discarded. In *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990), the Court of Appeals for the Fourth Circuit sought to harmonize ERISA's anti-alienation provision with the Code's exclusion. It did so by holding that the applicable nonbankruptcy law reference in the Code's exclusion was not limited to state law, but included all law, state and federal. Although the court noted that the debtors in *Moore* were not in control, that was not a determining factor, as demonstrated by that court's later holding in the case at bar while relying on *Moore*. *Shumate v. Patterson (In re Shumate)*, 943 F.2d 362 (4th Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S. Ct. 932 (1992).

Three other Courts of Appeals have followed the reasoning in *Moore*. The Sixth Circuit noted that the appli-

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[8] "The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." H.R. Rep. No. 595, 95th Cong., 2d Sess. 176 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6325.

cation of the Code § 541(c)(2) exclusion to pension plans in a bankruptcy context ". . . harmonizes the Bankruptcy Code, ERISA, and the Internal Revenue Code and gives effect to the express language of those statutes." *Forbes v. Holiday Corp. Savings and Retirement Plan (In re Lucas)*, 924 F.2d 597, 600-01 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2275 (1991). This interpretation also eliminates the different treatment of pension plan interests inside and outside of bankruptcy. As noted by the Tenth Circuit,

> We are also persuaded by the incongruity inherent in the narrower interpretation which would result in ERISA's anti-alienation provisions trumping state law until bankruptcy, but withdrawing that protection upon bankruptcy unless state law would give it.

Gladwell v. Harline (In re Harline), 950 F.2d 669, 675 (10th Cir. 1991). *See also, Velis v. Kardanis*, 949 F.2d 78 (3d Cir. 1991).[9]

3. To accept Petitioner's construction of Code § 541(c)(2) is to read it out of the law when the debtor elects the state exemptions under Code § 522(b)(2).

Petitioner would have the exclusion under Code § 541(c)(2) limited in its application to those trusts qualifying as spendthrift trusts under state law. If Petitioner is correct, then there is no need for Code § 541(c)(2) in

[9] Even the Ninth Circuit, which has elected to follow its prior decision in *Daniel* limiting the Code § 541(c)(2) exclusion to state spendthrift trust law, expressed some concern about the logic of that position:

> We recognize a certain incongruity in the notion that only ERISA's anti-alienation provisions offer protection until bankruptcy, and only state spendthrift provisions do so in bankruptcy. The same might be said of the idea that some ERISA plan benefits are protected from creditors before bankruptcy and lose that protection upon bankruptcy.

In re Kincaid, 917 F.2d 1162, 1166 (9th Cir. 1990).

an opt-out state such as Virginia[10] (or in any case in which the debtor elects the state exemptions), since such a trust would already be exempt under "State . . . law that is applicable." Code § 522(b)(2)(A). Thus, the exclusion section must be read to refer to more than state spendthrift trust law which already operates to provide an exemption.

4. The term "applicable nonbankruptcy law" appearing in Code § 541(c)(2) is clear and unambiguous, and, according to rules of statutory construction, requires the exclusion of ERISA pension plans from the debtor's estate.

This Court has often reiterated the long-standing rule of statutory construction that there is no need to resort to legislative history or any other collateral source in order to interpret a statute that is not ambiguous. *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S. Ct. 403, 407 (1990); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 807 (1989); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Code § 541(c)(2) is just such an unambiguous statute. The use of the term "applicable nonbankruptcy law" is clear in the context of this section because of its consistent use throughout the Bankruptcy Code, and "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

The use of the phrase "applicable nonbankruptcy law" in Code § 541(c)(2) to refer to *either* federal *or* state law is in keeping with the use of that term throughout the Bankruptcy Code. For instance:

[10] Certain states have elected to require their citizens to utilize only those exemptions available under state law by "opting-out" of the federal exemption scheme. Virginia, the residence of Mr. Shumate, is such a state. Va. Code § 34-3.1 (1990).

- Code § 101(56) uses "applicable nonbankruptcy law" to define intellectual property protected under federal or state law;
- Code § 108 uses "applicable nonbankruptcy law" to extend the time in which the bankruptcy trustee may pursue a cause of action that the debtor might have pursued under federal or state law;
- Code § 365(n)(1)(B) uses the phrase "applicable nonbankruptcy law" to describe the time period for a license agreement under intellectual property laws;
- Code § 1125(d) uses the phrase "applicable nonbankruptcy law" to exempt post-petition disclosure statements from certain disclosure requirements, such as those of federal or state securities laws; and
- Code § 1126(b)(1) uses the phrase "applicable nonbankruptcy law" to declare that any plan solicitations accepted or rejected pre-petition will be valid if disclosure is made in accordance with, for instance, federal or state securities laws.[11]

Moreover, throughout the Bankruptcy Code, Congress has demonstrated that it can limit the application of nonbankruptcy law only to state law when it so desires:

- Code § 109(c)(2) permits an entity to be a debtor under Chapter 9 only if the entity is authorized to be such a debtor "by State law";
- Code § 362(b)(12) limits the length of the automatic stay with respect to foreclosing on ship or fleet mortgages under "applicable State law";

[11] Code § 522(b)(2)(B) allows a debtor to exempt his or her interest in a joint tenancy or tenancy by the entirety to the extent this interest is exempt from seizure under "applicable nonbankruptcy law." While "applicable nonbankruptcy law," in this context, appears to encompass state law only, this does not limit the use of that term throughout the Code. "Applicable nonbankruptcy law" can encompass either federal or state law, and such a use of the term in the context of Code § 541(c)(2) is not inappropriate.

- Code §§ 522(b)(1) & (2) permits the debtor to seek exemptions under the "State law that is applicable";
- Code § 523(a)(5) excludes from the debtor's discharge any debt for either spousal or child support "made in accordance with State or territorial law"; and
- Code § 903(1) declares that a "State law" prescribing a method of composition of indebtedness of a municipality cannot bind a creditor without that creditor's consent.

A cardinal rule of statutory construction is that the statute should be read as a whole and that the meaning of a word or phrase depends on context. *See King v. St. Vincent's Hosp.*, ___ U.S. ___, 112 S. Ct. 570, 574 (1991). A reading of "applicable nonbankruptcy law" to include both federal and state law in Code § 541(c)(2) is therefore proper. Furthermore, this interpretation, which allows the section to include the anti-alienation provisions of ERISA, is also consistent with the policy that a word is presumed to have the same meaning throughout a statute. *Morrison-Knudsen Const. v. Dir., Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983), (*citing Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Congress' deliberate use of a term cannot be ignored, especially in a Code that was drafted and enacted in one piece. The drafters used "applicable nonbankruptcy law" to refer to either federal or state law, while they specifically referred to federal law or state law if they desired to limit the provision to one or the other. Such a use of the term does not make it "inherently ambiguous" and subject to interpretation as Petitioner would assert. Rather, the term is clear, and this Court simply must enforce it, *see Chevron*, 467 U.S. at 842-43, by declaring ERISA to be "applicable nonbankruptcy law" and thus excluding ERISA pension plans from the bankrupt's estate.

5. Even if the term "applicable nonbankruptcy law" is not unambiguous, proper rules of statutory construction will lead to the same result–that Code § 541(c)(2) excludes ERISA pension plans from the debtor's estate.

Even if this Court were to determine that "applicable nonbankruptcy law" is not an unambiguous phrase, the rule of statutory construction that the Court has adopted in other bankruptcy cases would lead to exclusion of ERISA pension plans from the debtor's estate. When a provision of the Code is ambiguous, the Court looks to the Bankruptcy Act in effect prior to the enactment of the Bankruptcy Code for instruction. The Court is reluctant to accept any significant changes in the pre-Code practice that were not clearly enunciated by Congress in some way. *Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773, 779 (1992); *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("The Court has followed this rule with particular care when construing the scope of the bankruptcy codifications"); *Kelly v. Robinson*, 479 U.S. 36 (1986).

Section 70(a)(5) of the Bankruptcy Act described those assets that did and did not become a part of the bankruptcy estate:

> (a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . .
>
> (5) property, including rights of action, which prior to the filing of the petition he [the debtor] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . .

11 U.S.C. § 110(a)(5) (repealed 1978).

This section was interpreted to include a two-part test to determine whether an asset should be property of the debtor's estate. First, the court was required to determine whether the asset was "property"; and then the court had to decide whether the asset was "transferable." *See, e.g.*, *Segal v. Rochelle*, 382 U.S. 375 (1966). With respect to the first prong of this test, the courts recognized a difficulty in defining the word "property." *Id.* at 379. Therefore, the courts examined the overall purpose of the Bankruptcy Act to determine what limitations should be put on this definition:

> [o]ne purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future.

Id. This desire to protect the debtor's fresh start caused courts to exclude from the definition of "property," and thus from the bankruptcy estate, wages and assets that were "designed to function as a wage substitute at some future period." *Kokoszka v. Belford*, 417 U.S. 642, 648 (1974) (*quoting Lines v. Frederick*, 400 U.S. 18, 20 (1970) (excluding a debtor's accrued vacation pay from the definition of "property")). Such an exclusion would certainly apply to ERISA plans, and the Fifth Circuit so held in *Matter of Turpin*, 644 F.2d 472 (5th Cir. 1981). *See also Matter of Nunnally*, 506 F.2d 1024 (5th Cir. 1975).

Even if ERISA plans and other trusts with anti-alienation provisions would fulfill the definition of "property" under the Bankruptcy Act, such assets would not be "transferable," and therefore would not be included in the bankruptcy estate. Subsection (5) of § 70(a) excluded non-transferable assets, whether those assets were made non-transferable by federal *or* state law. Courts construed this section to exclude from the estate federally created trusts. *See Tennessee Valley Authority v. Kinzer*, 142 F.2d 833 (6th Cir. 1944) (excluding from bankrupt's estate his interest in a non-transferable, federally created retirement system trust); *In re McManaman*, 50 F. Supp. 869 (N.D.

Ill. 1941) (refusing to turn over to bankruptcy trustee debtor's interest in federally created retirement system trust).

Thus, it is clear that ERISA pension plans would not have been included in the bankruptcy estate under pre-Code practice. Congress did not indicate an intent to change this practice. In fact, the legislative reports agree that Code § 541 preserved the pre-Code practice.[12] Petitioner argues that the change in the strategy of Code § Section 541(a) (which includes all property not specifically excluded) from the previous practice under the Bankruptcy Act (by which what was included in the estate was specifically defined) evidences a substantial change in the pre-Code practice and that the approach to the interpretation of Code § 541(c)(2) should therefore take into account such change. Certainly, Congress did change the procedure by which the debtor's estate is created; it also changed some of the kinds of assets to be excluded from the estate. *Compare* 11 U.S.C. § 110(a)(5) (repealed 1978) *with* 11 U.S.C. § 541(c)(1). What Congress did not change, however, is the result with respect to trusts with anti-alienation provisions. The exclusion for non-transferable trusts was clearly carried forward in Code § 541(c)(2), which allows the court to enforce restrictions on the transfer of beneficial interests enforceable under "applicable nonbankruptcy law." Petitioner's contention that the change in Code § 541(a) to create an all-inclusive estate indicates that ERISA pension plans should not be excluded from the debtor's estate is erroneous, because the Petitioner has focused solely on the mechanics of this section. ERISA pension plans should be excluded from the estate under § 541(c)(2) because ERISA's anti-alienation provision is "applicable nonbankruptcy law."

[12] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5869; H.R. Rep. No. 595, 95th Cong., 2d Sess. 176 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6325.

B. Code § 522(d)(10)(E) applies to more than employee pension plans, so that not all benefits which would be exempted under that Code section would be excluded under the applicable nonbankruptcy law exclusion of Code § 541(c)(2).

Not all bankrupts can avail themselves of the exemption scheme set forth in Code § 522(d) since some states, including Virginia, have opted-out of that exemption scheme. Even in those states which have not opted-out, those exemptions are not available if the debtor elects the state exemptions under Code § 522(b)(2).[13]

The exclusion under Code § 541(c)(2) operates solely with respect to pension plans, while the exemption under Code § 522(d)(10)(E) encompasses many more employee benefits plan and payment arrangements. To completely understand the structure and scope of that section, its precise language must be analyzed. The statute exempts the debtor's right to receive the following property:

> (E) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor unless—
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the

[13] Petitioner misapprehends the interplay between the state and federal exemption provisions of the Code by contending that *only* the federal exemptions are available in non-opt-out states, when, in fact, residents of those states have a choice between federal and state exemptions. See Petitioner's Brief, pp. 16-18, and pp. 50-55.

Internal Revenue Code of 1954 (26 U.S.C. §§ 401(a), 403(a). 403(b), 408, or 409.)

Code § 522(d)(10)(E) (emphasis added). This section clearly exempts interests in employee benefit plans that would not qualify as pension plans. It encompasses plans that are not excluded under Code § 541(c)(2) pursuant to ERISA's anti-alienation provision. Therefore, basically all employee benefit plans (including those which do not qualify as pension plans) are subject to this exemption, except for those plans which were established by an insider and which do not qualify under the enumerated sections of the Internal Revenue Code. The sole reference in that section to a "qualified plan" is in Code § 522(d)(10)(E)(iii), which is part of the exception, thereby depriving a non-qualified plan of the exemption if it was established by an insider (an essentially self-settled plan) and the benefits were calculated on the basis of age or length of service. Plans which qualify under the enumerated Internal Revenue Code sections are all governed by limits on the annual amount which can be contributed.[14] Seen in that light, the reason for the exception from the exemption becomes clear—to prevent the establishment by insiders of plans which have the opportunity to receive unlimited contributions at any time. The section is not, as Petitioner would urge, limited to interests governed by ERISA's anti-alienation provision. *See In re Threewitt*, 24 B.R. 927 (Bankr. D. Kan. 1982). In fact, not all plans listed in Code § 522(d)(10)(E)(iii) are plans subject to ERISA's anti-alienation provision by virtue of being governed by Title I of ERISA.[15]

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[14] *See e.g.*, IRC §§ 410 & 415.

[15] Pursuant to ERISA § 4(b), simplified employee pensions, government plans, and certain church plans are not employer plans within the meaning of ERISA § 4(a) and thus are not subject to several provisions of ERISA which apply to other pension plans; *e.g.* ERISA § 206(d)(1) and the preemption provisions of ERISA § 514(a).

II. ERISA § 206(d)(1) constitutes an exemption under the other federal law language of Code § 522(b)(2)(A) which the debtor may claim, thereby precluding alienation of the debtor's interest in an ERISA plan.

A. ERISA § 206(d)(1) constitutes a federal exemption in bankruptcy.

Bankruptcy Code § 522(b)(2)(A) creates an exemption for assets exempted "under Federal law." Even if the Court determines that Code § 541(c)(2) does not exclude ERISA plan assets from the bankruptcy estate, the anti-alienation provision of ERISA nonetheless provides an exemption under this "other federal law" language of § 522(b)(2)(A).

An exemption is a "privilege allowed by law to a judgment debtor, by which he may hold property to a certain amount or certain classes of property, from all liability to levy and sale on execution or attachment." *In re Komet*, 104 B.R. at 806 *(quoting* Black's Law Dictionary 513 (5th ed. 1979)). The body of federal common law developed under ERISA clarifies "that ERISA § 206(d) effectively operates as an exemption for covered plan benefits." *In re Komet*, 104 B.R. at 806-07. The holdings in *Mackey* and *Guidry* establish that the language in ERISA does not merely set up guidelines to qualify pension plans for tax exempt treatment, but sets up an explicit federal exemption protecting pension benefits from alienation.

B. The structure of the Bankruptcy Code demonstrates a strong congressional policy favoring application of ERISA § 206(d)(1).

1. The Bankruptcy Code has not repealed ERISA § 206(d)(1).

The Bankruptcy Code contains no provision repealing any part of ERISA. *See* Bankruptcy Code, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549, 2682 (1978) (repealing the Bankruptcy Act). It is a settled rule of law that there is a presumption against repeal by implication. *Graham v. Goodcell*, 282 U.S. 409, 425 (1931). Similarly, a court may not repeal by implication if it is possible to harmonize the

statutes. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Burroughs*, 289 U.S. 159, 164 (1933).

Moreover, the use of legislative history to dilute ERISA's anti-alienation provision disregards established principles of statutory construction. This Court has repeatedly emphasized the long-standing rule that resort to legislative history to construe an unambiguous statute is inappropriate. *United States v. Ron Pair Enterprises*, 498 U.S. at 241-42. If Congress intended to exclude ERISA plans from "other federal law" exemption of Code § 522(b)(2)(A), it would have certainly done so in the Bankruptcy Code itself.

2. The legislative history to Code § 522(b)(2)(A) is insufficient to support an implicit repeal of ERISA § 206(d)(1).

Petitioner attaches great significance to the omission of ERISA from the illustrative list of Code § 522(b)(2)(A) exemptions included in the Bankruptcy Code's legislative history. In light of the unambiguous face of the Code, however, resort to the Bankruptcy Code's legislative history is improper. In addition, it is inappropriate to rely upon illustrative lists in the legislative history to add a limitation to one statute and effectively repeal another statute. *Pension Benefit Guar. Corp. v. LTV Corp.*, — U.S. —, 110 S. Ct. 2668, 2677 (1990).

The legislative history itself demonstrates that the list of exemptions was not exclusive.[16] If Congress had desired to limit other federal law to only certain federal laws, it would have done so by incorporating the list into the statute and making it "exclusive" as opposed to "illustrative." It is a "non-sequitur to say that the failure to include

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[16] H.R. Rep. No. 595, 95th Cong., 2d Sess. 360 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6316 ("If the debtor chooses [sec. 522(b)], some of the items that may be exempted under other federal laws include . . . ."); S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5861 ("Some of the items that may be exempted under federal laws other than title 11 include . . . .").

something on an illustrative list is probative of an intent to exclude it from that list." *In re Komet*, 104 B.R. at 815.

Petitioner's reliance upon the legislative history's omission of ERISA is further undercut by the mistakes contained within the legislative history. The illustrative list contains two statutory provisions that were repealed prior to 1978 when the Bankruptcy Code was enacted, namely, civil service benefits (repealed in 1966) and foreign service benefits (repealed in 1974). Similarly, the list misnames veterans benefits as Congressional Medal of Honor benefits. *See In re Burns*, 108 B.R. 308, 315 n.7 (Bankr. W.D. Okla. 1989).

This Court has also previously recognized that the omission of ERISA from the illustrative list does not make it any less a federal exemption on par with the exemptions on the illustrative list. Noting that ERISA's anti-alienation provision is "consonant with other statutory provisions designed to safeguard retirement income," the Court then footnotes several statutes which are contained in the illustrative list. *Guidry*, 493 U.S. at 838, n.13.

In point of fact, the legislative history of Code § 522(b)(2)(A) strongly supports the operation of ERISA § 206(d)(1) in the bankruptcy context and belies the Petitioner's interpretation. In drafting Code § 522 Congress embraced the basic exemption scheme of § 6 of the Bankruptcy Act, which honored exemptions existing outside of bankruptcy, and then added an alternative set of exclusively federal exemptions. 11 U.S.C. § 24 (repealed 1978). Section 6 of the Bankruptcy Act permitted debtors to take advantage of all the exemptions available under both the laws of the United States and the laws of the state in which the debtor filed. This provision was reenacted in the Bankruptcy Code as § 522(b)(2)(A), substantially without change. The exclusively federal exemption scheme added by Congress was enacted under Code § 522(d), and is indepent from the exemption scheme under Code § 522(b)(2)(A). Congress' "substantial reenactment of

Section 6 of the Act in Section 522(b)(2)(A) indicates that Congress there also intended to continue prior law, which simply incorporated by reference such federal exemptions as might otherwise be available to the debtor absent bankruptcy." *In re Komet*, 104 B.R. at 813.

C. There is no conflict between Code § 522(b)(2)(A) and § 522(d)(10)(E).

Petitioner attempts to explain why Code § 522(b)(2)(A) does not include the ERISA's anti-alienation provision within its ambit by setting up a non-existent conflict between that section and Code § 522(d)(10)(E). Congress provided debtors an election to choose between (1) the exemption scheme which includes state law exemptions and exemptions under federal law other than under the Bankruptcy Code (the 522(b) scheme), or (2) the exemption scheme established under the Bankruptcy Code (the 522(d) scheme).[17] Accordingly, two separate and free-standing exemption schemes exist under the Bankruptcy Code. Ignoring that fact, Petitioner erroneously states that exempting ERISA pension plans under the 522(b) exemptions would render the 522(d) exemptions "without a purpose or create inconsistent federal pension exemptions in bankruptcy." Petitioner's Brief, p. 50.

There is no conceivable way that the application of the 522(b) exemptions to pension plans can render the 522(d) exemptions without a purpose since the 522(b) exemptions *cannot* apply when the 522(d) exemptions are elected, and vice-versa. If Petitioner's position were correct, there would be a "reasonable needs" exemption when the 522(d) scheme was elected, and *no* exemption when the 522(b) scheme was elected. This result clearly is not countenanced under the policy expressed in this Court's holding in both *Mackey* and *Guidry*.

Admittedly, the existence of these two schemes creates different exemptions. It would be remarkable and unne-

[17] Congress also permitted the states to mandate that only the 522(b) scheme would be available to its residents. Code § 522(b)(1).

cessarily duplicitous if both exemption schemes exempted precisely the same assets to precisely the same extent. Therefore, the inconsistencies to which Petitioner points are ones of quantity and scope, an understandable distinction between two distinct statutory rules. While the 522(d) scheme exempts only the portion of a pension plan "reasonably necessary for . . . support," its scope is much broader than just pension plans. The 522(b) scheme exempts all of the debtor's interest in a pension plan, but is limited only to pension plans. This is just another example of the careful balances struck by Congress in formulating the exemption schemes.

Additionally, some courts have held that the Code § 522(d) scheme limits the exemption to payment or distribution rights (benefits in "pay status"). *See, e.g., In re Harline*, 950 F.2d 669; *Velis v. Kardanis*, 949 F.2d 780.

Both the § 522(b) and the § 522(d) exemption schemes, although in differing fashions and degrees, protect retirement benefits from creditors within and outside of bankruptcy. There was simply no reason for Congress to further complicate the Bankruptcy Code by taking pains to insure that there was no overlap between mutually exclusive exemption schemes. *See, e.g., In re Threewitt*, 24 B.R. 927.

III. CONGRESS HAS ALREADY ENUNCIATED A STRONG PUBLIC POLICY IN FAVOR OF THE PROTECTION OF RETIREMENT BENEFITS AND HAS CHOSEN NOT TO DISCRIMINATE BETWEEN THOSE EXERCISING DOMINION AND CONTROL AND THOSE NOT EXERCISING DOMINION AND CONTROL.

If Petitioner fails, as he should, to convince this Court that the acts of Congress do not exclude or exempt the pension benefits of a debtor, then Petitioner would seek to persuade the Court that it should engraft a public policy onto ERISA and the Bankruptcy Code that was not enunciated by Congress. Congress has adopted a public policy strongly in favor of the protection of pension benefits, and has construed the Bankruptcy Code to provide debtors a fresh start. The "fresh start" for younger persons may

be to allow them to come through bankruptcy with their home, their personal possessions, their pension benefits that have already accrued, and their earning capacity. For an older bankrupt, the sole basis for his or her fresh start may be the accrued pension benefits, whether in pay status or not, accumulated over a lifetime of labor.[18] Congress surely did not intend to discriminate on the basis of age. In fact, Congress moved strongly in the other direction and explicitly put pension plans beyond the reach of the creditors of the participant. Although not involving a debtor in bankruptcy, this Court has recognized the strong public policy behind the enforcement and protection of ERISA's anti-alienation provision, by holding that:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
>
> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an anti-garnishment provision. Such a provision acts, by definition, to hinder the collection of lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable.

Guidry, 493 U.S. at 376-77 (emphasis in opinion). Although *Guidry* is not a bankruptcy case, the clear public policy

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[18] *See* Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W. Va. L. Rev. 411, 461-62 (1991-92).

recognized and articulated by the Court should be recognized both within and without bankruptcy. To have the result changed because a creditor was able to force a debtor into involuntary bankruptcy (or because the debtor voluntarily sought the fresh start permitted under the law) comports with neither law nor logic. Congress has enunciated its policy, and this Court should not be asked to create a different one.[19]

IV. IF THE COURT HOLDS IN FAVOR OF PETITIONER, THEN IT STILL LEAVES OPEN MANY QUESTIONS WHICH WILL FOSTER CONTINUING LITIGATION AND IT EFFECTIVELY NULLIFIES THE NATIONAL SCHEME ERISA SOUGHT TO IMPLEMENT.

A. If the Bankruptcy Code does not exclude or exempt the interest of a debtor in a pension plan, then the bankruptcy courts will be forced to determine whether such interests are excluded under state spendthrift trust law.

State spendthrift trust law will protect a trust which contains spendthrift provisions only to the extent that the settlor who is also a beneficiary did not retain such dominion and control that the trust is essentially an alter-ego of the settlor. The courts have had no trouble finding that pension plans established by a closely-held corporation were in effect established by its controlling shareholder. However, experienced trust counsel cannot help but stand in amazement at the bankruptcy courts' lack of understanding as to the extent of dominion and control required before a spendthrift trust should be considered self-settled. For example, the bankruptcy courts have relied upon a series of factors that are not truly relevant under classic spendthrift trust law. In some cases, the bankruptcy courts have found the requisite dominion and control because an

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[19] In fact, all but eight of the states have adopted a clear public policy to protect pension plans by adopting state statutes which exempt such plans. For an analysis of such statutes see Golden, *What Have We Stepped Into? Qualified Plans in Bankruptcy*, 17 ACTEC NOTES 186, 195 (1991).

employee who was not an owner could receive his or her interest in the plan by terminating employment.[20] In one particularly egregious case using that test, the bankruptcy court found that the plan of Trans-World Airline was not a spendthrift trust as to a pilot for that airline. *In re Gallagher*, 101 B.R. 594 (Bankr. W.D. Mo. 1989). Other indicia applied by the bankruptcy courts to trusts which were not established by the controlling shareholder have been the presence of direct employee contributions,[21] the presence of loan provisions even though no borrowing could be had without the approval of the plan administrator,[22] and the presence of the ability of the plan administrator to make hardship distributions.[23] Because of the wide variety and inconsistency of bankruptcy court determinations as to what constitutes a spendthrift trust under state law, the national scheme of ERISA is frustrated, plan administrators are asked to accept an unreasonable burden, and different debtors located within different states (or sometimes different federal districts within the same state) will be treated differently.[24]

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[20] The court in *Goff* wrote that termination of employment was an act of such independent significance that it was not an indicia of dominion and control. *Goff*, 706 F.2d at 589. That has not stopped the bankruptcy courts from applying that test. *In re Sheppard*, 106 B.R. 724 (Bankr. M.D. Fla. 1989); *In re Silldorff*, 96 B.R. 859(Bankr. C.D. Ill. 1989); *In re Loe*, 83 B.R. 641 (Bankr. D. Minn. 1988).

[21] *In re Swanson*, 873 F.2d 1121 (8th Cir. 1989). Some courts have even held that funding by the employer is made with what would have been employee wages, and that the employees therefore indirectly made the contribution. *In re Weeks*, 106 B.R. 257 (Bankr. E.D. Okla. 1989).

[22] *In re Silldorff*, 96 B.R. 1014.

[23] *Id.*

[24] Such a result has already occurred in several states. *Compare In re Bryan*, 106 B.R. 749 (Bankr. S.D. Fla. 1989) *with In re Bryant*, 106 B.R. 727 (Bankr. M.D. Fla. 1989) and *In re Sheppard*, 106 B.R. 724. *Compare In re Burns*, 108 B.R. 308 *with In re Brown*, 95 B.R. 216 (Bankr. N.D. Okla. 1989).

B. A majority of states have enacted statutes which provide a state law exemption for pension plans. Several courts have held that such statutes are preempted by ERISA, and thus fail to provide the protection contemplated by the state legislature. If pension plans are neither excluded nor exempt under federal law, then the preemption question will still be open, and debtors in different jurisdictions will be treated differently, thereby frustrating ERISA's national scheme.

Two courts of appeals have recently determined that state laws exempting pension benefits ("shield laws") from claims of creditors are not preempted by ERISA on the theory that state exemption schemes are necessary for the operation of the Bankruptcy Code. *See Heitkamp v. Dyke (Matter of Dyke)*, 943 F.2d 1435 (5th Cir. 1991); *Checkett v. Vickers*, ___ F.2d ___, 1992 WL 9491 (8th Cir. 1992). However, in states without shield laws, or in jurisdictions which hold that shield laws are preempted by ERISA § 514(a), the debtor enjoys no protection for the debtor's pension benefits despite the announced federal scheme of ERISA. Those questions would be made moot by a finding that the pension benefits are excluded (or if not excluded, exempted) under the construction of the Bankruptcy Code urged by Respondent.

C. Even if the Court decides that pension plan benefits are neither exempt nor excluded, the question as to whether the debtor's interest in the plan must be surrendered to the trustee in bankruptcy will still remain unanswered, thereby fostering more litigation.

In the case at bar, the employer's plan has been terminated and the amount of Respondent's interest in the plan has been determined and placed in escrow. However, most plans will not have been terminated, and the question will arise as to whether, since the debtor could not reach the benefit, the plan administrator is required to turn the asset over to the trustee under Code § 542. Courts have

disagreed as to whether the trustee has greater rights than the debtor or whether the trustee must wait for the time the debtor would receive distribution. In the latter case, the trustee cannot practically dispose of the interest immediately, and the Code's policy of speedy resolution will be frustrated if the case is kept open. *See In re Loe,* 83 B.R. 641 (holding that the trustee could not force an immediate turnover); *In re Deweese,* 47 B.R. 251 (Bankr. W.D.N.C. 1985).

D. The Internal Revenue Service has taken a position that could result in a disqualification of the entire plan if the assets of one participant are ordered to be turned over to the trustee.

The Internal Revenue Service, in private letter rulings, has determined that a plan breaches the anti-alienation rules under IRC § 401(a)(13) (the IRC counterpart to ERISA § 206(d)(1)) and thereby is disqualified from favorable tax treatment if the plan administrator complies with a turnover order. Priv. Ltr. Rul. 90-11-037 (Mar. 16, 1990); Priv. Ltr. Rul. 89-51-067 (Dec. 22, 1989); Priv. Ltr. Rul. 89-10-035 (Mar. 18, 1989). Even though IRC § 6110(j)(3) prohibits the use of private letter rulings as precedent, they are nonetheless indicative of the Internal Revenue Service's position. While some bankruptcy courts have held that the plans will not be disqualified, the Internal Revenue Service was not a party to those proceedings, and can hardly be held to be bound thereby. *See, e.g., In re Gallagher,* 101 B.R. 594; *In re Deweese,* 47 B.R. 251. No case has directly litigated the correctness of the Internal Revenue Service's announced position. The authority to determine tax liability under Code § 505 does not extend to the determination of the tax liability of the bankrupt's employer and the participants in the plan other than the bankrupt.

CONCLUSION

Congress has set forth its public policy that a debtor should be entitled to a fresh start under the Bankruptcy Code and that part of that fresh start should include the debtor's interest in an employee pension plan as defined in ERISA. This policy is a necessary adjunct to the overriding public policy of ERISA—to provide a uniform federal scheme which will ensure the retirement benefits of working Americans from every walk of life.

ERISA's anti-alienation provision, as recognized by this Court in *Guidry,* is the cornerstone of these policies. Congress effectuated these policies by maintaining the exclusion for trusts subject to a restraint on alienation under federal and state law, thereby excluding trusts subject to ERISA's anti-alienation requirement from the bankruptcy estate. Alternatively, ERISA's anti-alienation provision should be held to constitute an exemption under federal law other than the Bankruptcy Code. The wisdom of those public policies is not a question for the Court. If the public policy is to be changed, Congress should change it. Congress recognized that any other policy would subject the pension benefits of retirees to the caprices of the various states, with the bankruptcy courts in many cases putting their own spin on state law in order to resolve exemption and exclusion questions. Finally, the Internal Revenue Service's position that entire plans will be disqualified if the debtor's interest is not exempt cannot be overlooked. Surely, Congress could not have intended that the financial misfortunes of one participant could result in the direst of tax effects for all others.

Petitioner's positions stand the law on its head and logic on its ear. The College urges this Court to give to the statutes their obvious interpretation in order to carry out the express Congressional intent and thereby to set the law aright.

This the 3rd day of April, 1992.

Respectfully submitted,

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